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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Network Operator Services, Inc. Petition)	DA 98-1871
for Waiver or Reconsideration of)	
Universal Service Contribution)	

REPLY COMMENTS OF NETWORK OPERATOR SERVICES, INC.

Network Operator Services, Inc. ("NOS"), by undersigned counsel, hereby submits its Reply to the Oppositions and Comments filed by interested parties in the above-captioned proceeding. NOS urges the Commission to act expeditiously to grant NOS's Petition for Waiver ("Petition") and permit NOS to contribute to universal service based on actual, as opposed to prior year, revenue. In the alternative, if the Commission finds that good cause for granting a waiver does not exist, NOS respectfully requests that the Commission reconsider its determination that contributions to universal service should be based on prior year revenue.

I. GOOD CAUSE EXISTS FOR GRANTING NETWORK OPERATOR SERVICES, INC.'s PETITION FOR WAIVER.

The Commission should dismiss the arguments of BellSouth Corporation ("BellSouth") and AT&T Corporation ("AT&T") that NOS has not demonstrated good cause for a waiver of the Commission's universal service fund ("USF") contribution rules. BellSouth and AT&T argue that changes in a carrier's revenue is not a sufficient basis for a waiver, particularly since the

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Commission was aware of the possibility of year-to-year revenue fluctuation when it adopted the USF contribution mechanism. BellSouth at 2; AT&T at 3. They claim that granting NOS's Petition will set a dangerous precedent and will result in the USF contribution rules being dismantled piecemeal through the waiver process. BellSouth at 2; AT&T at 4-5.

These arguments are without merit. "Good cause" has been defined as "where particular facts would make strict compliance inconsistent with the public interest."^{1/} The particular facts relevant to NOS's situation make strict adherence to the USF contribution assessment rules inconsistent with the public interest. NOS's end-user revenue essentially has been cut by *one-third* from 1997 to 1998. To assess the full cost of its USF contribution, based on 1997 revenue, on its significantly smaller 1998 end-user base, NOS would have to charge those end-users much more than its competitors. This pass-through would price NOS's services out of the market, causing it to lose customers. The effects of attempts to recover its USF assessment from fewer and fewer customers could eventually force NOS out of business. Bankrupting competitive telecommunications carriers and reducing consumer choice is clearly inconsistent with the public interest, therefore, good cause exists for the Commission to waive its USF assessment rules and allow NOS to base its USF contribution on current year revenue.

^{1/} *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996) (FCC had good cause to waive reply comments on its rulemaking proposal concerning competitive bidding). *See also Changes to the Board of Directors of the National Exchange Carrier Association, Federal-State Joint Board on Universal Service*, CC Docket No. 97-21, CC Docket No. 96-45, Order (released September 29, 1997) (The FCC defined the standard for good cause as demonstration by the petitioner that "special circumstances warrant deviation from the rules and that such a deviation would better serve the public interest than the general rule.") *Id.* at ¶ 2.

The fact that the Commission may have considered the possibility of revenue variation *generally* when devising the USF assessment mechanism does not remove the need for a waiver in this particular case. The D.C. Circuit has held that the Commission may "discharge its responsibilities by promulgating rules of general application, which, in the overall perspective, establish the 'public interest' for a broad range of situations, but [it has an] obligation to seek out the 'public interest' in particular individualized cases."^{2/} Even assuming *arguendo* that, despite the possibility of revenue fluctuation, basing USF contribution on preceding year revenue is in the public interest generally,^{3/} it is clearly not in the public interest in this *particular* case. As discussed above, basing NOS's USF contribution on prior year revenue threatens its ability to provide telecommunications services in a competitive market. The public interest in this particular case is hardly served by bankrupting a carrier and reducing competition, even if the Commission's USF assessment methodology serves the public interest generally. The Commission should fulfill its obligation to seek out the public interest in this individual case and waive its USF contribution rules for NOS.

By granting such a waiver, the Commission would not create a situation where, as BellSouth claims, "the exceptions swallow the rule." BellSouth at 2. Moreover, contrary to AT&T's claim, this is not a situation where any carrier subject to the USF contribution rules could qualify for a

^{2/} *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1968) *cert. denied*, 409 U.S. 1027 (1972) (agency's discretion to proceed through general rules is intimately linked to the existence of a safety valve procedure for consideration of waiver requests based on special circumstances).

^{3/} *See* Section II, *infra* for a discussion of NOS's proposal to allow carriers to base their USF contributions on current year revenues.

waiver. AT&T at 5. While the revenues of other carriers may fluctuate from year to year, a drastic reduction such as NOS has experienced, where revenues have decreased by one-third from the previous year, is less common. Although other carriers have requested similar waivers, four such requests out of approximately two thousand universal service worksheet filers hardly constitutes an exception that swallows the rule. Therefore, the FCC may safely grant NOS's Petition without undermining the USF contribution rules.

II. THE FCC SHOULD RECONSIDER BASING USF CONTRIBUTIONS ON PRECEDING YEAR REVENUE.

Alternatively, whether in response to NOS's Petition for Reconsideration or on its own motion, the Commission should reconsider its decision to base USF contribution on prior year revenue. Both AT&T and NOS have set forth their proposals for basing USF contribution on current year revenue. AT&T at 7-9; NOS at 6-7. The Commission should seriously examine this issue and act to remedy the potentially harmful effects of its current assessment methodology.

In its Petition, NOS suggested that the Commission amend its rules to permit carriers to make a one-time election to base their universal service contributions on current year revenues. NOS at 6. AT&T supports NOS's proposal to allow carriers to base their universal service contributions on current year revenues, but argues that permitting carriers a one-time election to have their USF contributions based on current revenues would undermine competitive neutrality and allow carriers to "game the process." AT&T at 7. AT&T is wrong. NOS is not proposing to allow carriers to switch back and forth between periods used to assess USF obligations depending on which period would minimize their USF obligation. NOS specifically suggested a *one-time* election so that

carriers would not be able to "game the process." NOS's proposal would maintain competitive neutrality by requiring carriers to commit to a certain assessment methodology but still provide a flexible alternative for carriers experiencing a significant revenue decrease in any one year. However, once a carrier makes the current-year contribution, under NOS's proposal, that carrier would not be permitted to abandon that election in a subsequent year to avoid paying a larger USF contribution when its revenues increase.

Given the potentially devastating impact of the current assessment methodology on carriers with decreasing revenues, NOS urges the Commission to allow carriers to base USF contributions on current year revenues. NOS and AT&T agree that current year revenue is the preferable basis for assessing USF contributions. NOS at 6; AT&T at 7. Assessing USF contributions based on current year revenues would allow carriers to better tailor their liability to match their ability to pay and, as AT&T notes, would ameliorate the effects on carriers of substantial reductions in year-to-year revenues, such as NOS is experiencing. AT&T at 7-8. Moreover, although an individual carrier's revenue may vary widely from year to year, total industry revenue should remain relatively constant, thus the Commission will be able to make the revenue predictions necessary to set contribution factors. The Commission should reconsider its rules and allow carriers to use current year revenues as the basis for their USF contributions.

CONCLUSION

For the reasons set forth herein and in the Petition itself, NOS respectfully requests that the Commission grant it a waiver from application of the Universal Service worksheet and allow NOS

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to base its USF contribution on current year revenue. Alternatively, should the Commission find that NOS has not demonstrated good cause for a waiver, the Commission should reconsider its decision to use prior year revenues to calculate contributors' current universal service contributions.

Respectfully submitted,

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October 13, 1998

Certificate of Service

I do certify that I have this 13th day of October, 1998, served the following parties to this action with a copy of the foregoing REPLY COMMENTS of Network Operator Services, Inc. by hand delivery or by placing a true and correct copy of the same in the United States mail, postage prepaid, addressed to the parties listed below.

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